IN SUPREME COURT of the UNITED STATES

JOHN ROONEY,

Plaintiff in Error,

vs.

THE STATE OF NORTH DAKOTA,

Defendant in Error.

Brief of Defendant in Error

I.

POINTS AND ARGUMENTS.

The plaintiff in error seems to make but one point in his brief. It is stated on page 12 as follows: "Is the statute under which judgment was entered and sentence pronounced, as applied to the plaintiff in error, and the crime of which he was convicted *ex post facto* and void? This is the sole question in this case." And contends on

pages 11 and 12 that it is *ex post facto* for the following reasons:

1st. That three months are added to the term of imprisonment before the execution;

2nd. That, under the former law, the imprisonment before the execution in case there was no jail in the county in which conviction was held or where the jail in such county was deemed insecure, unfit or unsafe was in another convenient county in the state; under the latter, an amended law, such imprisonment is in the penitentiary of the state, and in close confinement;

3rd. Under the former law, the defendant was to be executed in the county in which he was convicted by the sheriff of such county or his deputy; under the latter law, the defendant is to be executed in the penitentiary of the state by the warden or his deputy.

It is conceded that the material differences between the old and the new law have been correctly stated, but plaintiff in error contends that by these changes in the law the punishment of the convict is increased and is therefore *ex post facto* and void.

First. This necessitates a determination of what is an *ex post facto* law. Was the statute (Ch. 99, Laws of 1903) under which this judgment was

entered *ex post facto* and void, as applied to plaintiff in error?

The passage of *ex post facto* laws is inhibited by both the federal and state constitutions, and, in commenting upon this, the Supreme Court of the United States has said: "The plain and obvious meaning and intention of the prohibition is this, that the legislatures of the several states shall not pass laws after a fact done by a subject or citizen which shall have relation to such fact and shall punish him for having done it. A prohibition considered in this light is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation."

Calder vs. Bull, 3 Dall., 386; 391 L. Ed., 648.

Justice Chase, in his enumeration of laws which he considered *ex post facto* under this prohibition specified, "*every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.*" (Colorado vs. Bull, 3 Dall., 390; L. Ed., 648; Cooley Const. Lim., 322). "But," he stated, "I do not consider any law *ex post facto* within the prohibition that mollifies the rigor of the criminal law,

but only those that create or aggravate the crime or increase the punishment or change the rule of evidence for the purpose of conviction."

Justice Washington declared an *ex post facto* law to be any law "which in its operation makes that criminal or penal which was not so at the time the act was performed, or which increases the punishment; or, in other words, which in relation to the offense or its consequences alters the situation of a party to his disadvantage."

U. S. vs. Hall, 26 Fed. Case, 84; affirmed in 6 Cranch, 171; 3 L. Ed., 189.

King vs. Mo., 107 U. S., 221; 2 Sup. Ct., 443; 27 L. Ed., 506.

Hopt vs. Utah, 110 U. S., 574; 4 Sup. Ct., 202; 28 L. Ed., 262.

In re Medley, 134 U. S., 160; 10 Sup. Ct., 384; 33 L. Ed., 835, etc.

Chief Justice Marshall defined an *ex post facto* law, "punishable in a manner in which it was not punishable when committed."

Cummings vs. Mo., 4 Wall, 277. 18 L. Ed., 356.

Ex parte Garland, 4 Wall, 333; 18 L. Ed., 366.

As to Justice Marshall's definition of an *ex post facto* law, Justice Peckham (now of the Supreme Court of the United States), for the Court of Appeals in New York, in State vs. Hayes, 140 N. Y., 484; 35 N. E., 951; 23 L. R. A., 830; 37 Am. St. Rep., 572, said: "That it materially affects the punishment prescribed for a crime is not the true test of an *ex post facto* law. In regard to punishment it must affect the offender unfavorably before it can be thus denominated. It seems to us plain that there can be no reason for any other view. I do not think that the mere reason of an alteration in the manner of punishment without reference to the question of mitigation necessarily renders an act obnoxious to the constitutional provision. * * * * I think that where a change is made in the manner of the punishment, if the change be of that nature which no sane man could by any possibility regard in any other light than that of a mitigation of punishment, the act would not be *ex post facto*, where made applicable to offenses committed before its passage."

From these definitions we are led to conclude that in order for a law to be *ex post facto* it must be such an one that creates or aggravates the crime or increases the punishment or changes the rule of evidence for the purposes of conviction. Or, in other words, it is a law which changes the

punishment and inflicts a greater punishment than the law annexed to the crime when committed.

Does the extending of the time of execution three months impose additional punishment or burden upon the convict by way of penalty? And it must be borne in mind in this connection that this additional time of three months gives to the Trial Court a discretion, but in no wise compels the Court to exercise this discretion.

Suppose the lawmakers, when amending Sec. 8305, had said that the execution should take place within twenty-four hours. There could have been no possible contention in that case that it was not an increased penalty, that additional punishment had been inflicted by depriving plaintiff of that very wise and humane provision requiring at least ninety days to elapse between the sentence and execution.

If this is sound, does it not follow that a Court in exercising the discretion vested in it by the new law has not increased the penalty or punishment, but mitigated as much as possible when the sentence is death? Can it be successfully contended that to grant an additional time to live imposes additional punishment upon the defendant? Life is sweet to all. The postponement by operation of this statute cannot be considered as a prolongation of the suffering and, therefore,

added punishment. "It is believed that the common instinct of mankind, when sane, is in favor of life and its prolongation. Death is the extreme penalty that can be inflicted. Any change in the penalty short of that is considered a mitigation and postponement of the time of its infliction is also a mitigation." In Com. vs. Gardner, 11 Gray, 438.

In Com. vs. Wyman, 12 Cush., 239.

Cooley on Const. Lim., Sec. 272.

In re Tyson, 13 Colo., 487; L. R. A., 472.

"If the shortening of the life for a single day is to the disadvantage of the convict, the extending of life for a day or three months must be considered to his advantage."

In Territory vs. Miller, 4 Dak., 173, 181; 29 N. W., 711.

State vs. Rooney, 95 N. W. (N. D.), p. 517.

II.

Does the fact that the convict, under the new law, is to be kept in the penitentiary in close confinement instead of in the county jail, either in the

county where convicted or in some other county of the state, in a cell, increase the punishment over any it was in the power of the Court to impose under the old law and thus increase the severity of the punishment of the convict? And plaintiff cites *ex parte* Medley, 134 U. S., 106; L. Ed. B. 33, p. 835, as well as the case of People vs. McNulty, page 13 of his brief, to substantiate his contention in the two preceding propositions.

Defendant in error contends that the words "close confinement," as used in the statute and sentence, mean nothing more than that the convict is to be *safely* and *securely* kept in confinement pending the execution of the judgment of death; that this adds nothing to the rigor of the former statute, Sec. 8320, which permitted the officer having in charge the convict to transfer and keep him in the jail of another county, where he could be safely and securely confined when under judgment of death, when he deemed the jail in his own county insecure or unsafe. As says Judge Cochrane in the State vs. Rooney, supra: "Safety and security through confinement being the unchanged purpose of both statutes, neither before nor since the act of March 9 could one convicted of a capital offense be admitted to bail. Appellant is entitled to as many privileges now in the penitentiary as the sheriff, under the former

law, could accord to him in the county jail. No additional restrictions are placed upon his seeing his legal or spiritual adviser or members of his own family. This statute works no change insofar as it describes his confinement as close, nor is the word "close" synonymous with the word "solitary" as the latter term is used in the Medley case. It is there pointed out that the word "solitary" has a well defined and well understood legal signification. The change made in the Colorado statute, construed in the Supreme Court in the Medley case, was from a close confinement in a jail, where the convict could be visited in the place of his confinement by his family, his legal, spiritual or medical adviser without restriction, to solitary confinement which excluded the possibility of such visits and inhibited them except under the restrictions of prison rules which might prohibit them altogether. The inference that plaintiff in error in citing the Medley case would have us draw that the penitentiary is intended for solitary confinement, that under the law regulating the control of convicts in the penitentiary and the rules of prison discipline in this state, he is shut out from seeing all human beings is answered in this: "That the law has not been changed in this regard from what it was when his offense was committed; the statute then and it now requires close confinement,

as we have already shown. Neither the law, the judgment nor the commitment requires solitary confinement. *No presumption can be indulged that the officers of the penitentiary charged with the execution of the judgment of the Court will go beyond the letter of its mandate and make appellant's confinement solitary,* in fact, when there was no legal authority therefor and when to do so would, as to appellant, be illegal." Holden vs. State, 137 U. S., 483; 11 Sup. Ct., 143; 34 L. Ed., 734.

(*a*) The fact that, under the new law, the penitentiary is in another part of the state from the county in which the convict was tried and by being held there may be somewhat remote from his friends is of little moment, for, under the former statute, he could be removed and confined in a jail in another part of the state. (Sec. 8320, Rev. Codes, 1899). The old law, all the time, has required the confinement and safe keeping of persons convicted of capital offenses between the time of sentence and execution.

"The confinement is no part of the punishment, but is an incident connected therewith, referable to penal administration as its primary object."

In re Tyson, 13 Colo., 487; 22 Pac., 810; 6 L. R. A., 472.

In Holden vs. State, 107 U. S., 483; 34 L. Ed., 734.

The Medley case, supra, can avail the plaintiff in error nothing. That case was decided upon two propositions: First, the fact that solitary confinement, as it is legally understood, was added to the punishment; second, the withdrawal from the prisoner knowledge of the time when his execution should take place; that is, this condition of uncertainty might exist for four weeks.

In the Medley case, supra, cited by plaintiff, it was not the opinion of an undivided Court. Two of the learned jurists on that bench dissented, and Justice Brewer in his opinion contended that the Court had violated the maxim "*De minimis non curat lex.*"

And the California Court finally succeeded in reaching a conclusion in harmony with the sentiment of Justices Brewer and Bradley, "whereby a convicted murderer was not permitted to escape the death he deserves and be turned loose on society."

People vs. McNulty, 93 Cal., 427; 29 Pac., 61; 26 Pac., 598; 28 Pac., 816.

III.

Does the fact that the defendant, under the new law, is to be executed at the penitentiary by the warden or his deputy instead of, under the old law, being executed in the county in which he was convicted by the sheriff or his deputy bring the new and amended statute within the constitutional inhibition? Counsel does not specifically state but we infer that he contemplates that to be hung by the warden and in a penitentiary is to bring opprobrium and increased moral obloquy upon the convict's name and character. If this is his intent we reply, nothing can aggravate the disgrace and infamy following a capital conviction for willful, deliberate and premeditated murder.

In re Tyson, 30 Colo., 487; 22 Pac., 810; 6 L. R. A., 472.

He is branded by the verdict of the jury as a felon, unfit to live longer. His offense was infamous. The Court has pronounced upon him the sentence of death.

IV.

Counsel for plaintiff, by citing the McNulty case, may intend to put in question the *jurisdiction* of the Court to determine the question whether or

not the change in this law works to the advantage or disadvantage of the convict. In other words, which would be the severer punishment, imprisonment for thirty days longer before hanging, under the new law, or death by hanging thirty days earlier, under the old law, would depend upon the disposition or temperament of the convict, and, therefore, not for the Court to decide.

This contention may have had support in the case of Hartung vs. People, 22 N. Y., 695, but has since been condemned by the Court of Appeals of New York and by the Courts of many other states, and we contend it is a question of law, pure and simple, and for the Courts to decide.

> See People vs. Hayes, 140 N. Y., 488; 35 N. E., 951; 23 L. R. A., 830; 37 Am. St. Rep., 572, and other cases cited by Mr. Justice Cochrane in 95 N. W., p. 518.

Counsel for plaintiff inquires, p. 12 of his brief: "Is the statute under which judgment was entered and sentence pronounced, as applied to the plaintiff in error, and the crime of which he was convicted, *ex post facto* and void?" And again, on page 19, "We are dealing with a question of the constitutionality of this statute and nothing else.

If the statute is constitutional, the judgment must stand; if it is unconstitutional, it must be vacated and set aside." From this we understand his position to be that, in the event the Court should find this amended law unconstitutional and void, the prison doors would be open and John Rooney would be given his liberty. In other words, if the Court should find that this new and amended law is *ex post facto* and, therefore, unconstitutional, then the question would naturally and necessarily arise as to the operation and effect of the saving clause. For, if there is nothing in the new statute itself to show this legislative intent and our general saving clause, Sec. 5142, Rev. Codes of 1899, does not operate, then the defendant, John Rooney, must be let go to menace and prey upon society. On the other hand, if this amended law is *ex post facto,* unconstitutional and void, and the legislative intent from the act itself divulges a requisite saving clause, or, failing in that, said Sec. 5142 so operates as to give effect to the penalty under the old statute, then Rooney must hang and pay the penalty of his crime.

From a reading of Sec. 17 of the new statute, supra, it appears that the legislature attempted to reach past offenses as well as future ones.

(*a*) Assuming, for the sake of argument, that the law, by reason of the above attempt, is

ex post facto, can it be maintained that the legislature intended to release all past offenders charged with murder and condemned to death? Clearly not, the very opposite intent is expressed in the act.

(*b*) Would the legislature have passed this act at all with knowledge that it could not be carried out as an entirety? From a reading of Sec. 17, it plainly appears that the governing motive in its passage was the saving of expense.

(*c*) "It is a familiar principle of law that in considering the question as to the effect that a later statute has upon a former statute upon the same subject, by way of repealing the same, the intent of the legislature is to be followed when it is apparent, unless such intent is inconsistent with the express language of the new statute."

People vs. Lambier, 5 Denio, 9.
Smith vs. The People, 47 N. Y., 336.
Mongeon vs. The People, 55 N. Y., 613.

(*d*) That a new statute should in no case be construed to work a repeal of existing law when such construction will necessarily prevent the punishment of crime or work a public mischief, unless no other reasonable construction can be given to it. See cases last above cited.

Again: Sec. 5142 of the Rev. Codes of 1899, which is a copy of Sec. 13, Revised Statute of the United States, reads as follows: "The repeal of any statute by the legislative assembly shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any particular action or prosecution for the enforcement of such penalty, forfeiture or liability." What did the legislature mean by the words, "shall expressly provide?" Does it mean that the legislature should directly, specifically and with positive certainty, giving no form of opportunity for doubt, quibble or question, or that they designed and intended that the enactment should apply to and extinguish penalties, forfeitures or liabilities incurred under such prior act? What did they say in their repealing clause under the act of March 9, 1903? "All acts and parts of acts in conflict with the provisions of this act are hereby repealed." This section in no wise refers to penalty, only to procedure, for the simple reason that the punishment for murder is unchanged by the new act.

Again: Let us read Sec. 17 in connection with Sec. 16. We find that the legislature, implied-

ly at least, continues in force and effect the same penalty as under the old law, to-wit: hanging.

If the contention of counsel should be that there is no saving clause in the act of March 9, this could be of no force for the reason that it is read into every enactment of this character unless expressly *stated to the contrary.*

Gould & Tucker, in their notes of the Revised Statutes of the U. S., Vol. 1, p. 3, say, that the words penalty, liability and forfeiture as used in this section are synonymous with punishment, and say that under this provision the repeal of an act defining a crime and its punishment does not prevent the prosecution and conviction of a party for its prior violation. U. S. vs. Barr, 4 Sawyer, 254. It covers a prosecution under a statute which authorizes an imprisonment as well as a fine.

U. S. vs. Matthews, 23 F. R., 74.
U. S. vs. Ulrici, 3 Dil., 532.
Suth. on Const., Sec. 225 and Sec. 226.

And it forms a part of every repealing statute passed since its enactment in 1871 and not manifesting a different intent. Cases cited.

If the Court finds that Sec. 5142 acts as a saving clause and must be read into the law of 1903, then all question and difficulty in this case fades

away. It does not become necessary to struggle with the question of *ex post facto*, greater or lesser punishment, constitutionality or unconstitutionality of said law. It simply remains for the Court to order the Trial Court to proceed according to the law as it existed.

In re Parks, 45 N. W., 824.
People vs. Bemis, 16 N. W., 794.
Ex parte Gilmore, 12 Pac., 80.
State vs. Marple, 14 Pac., 521.
Ratzky vs. People, 29 N. Y., 127.

Errors and mistakes not regarded unless they prejudice or tend to prejudice defendant in a substantial right.

8423 Rev. Codes, N. D.

If, however, the Court holds that law in full force and effect as amended, from the time of its enactment, and applies to the case at bar in its entirety, and that it is in no manner obnoxious to the constitutional provision against *ex post facto* laws, then, in that event, the decision of our Supreme Court should be affirmed.

But, if the Court holds that Sec. 5124 of the

Revised Codes of North Dakota does not act as a saving clause, then the statute in question has a retroactive effect and that it is *ex post facto* so far as the same relates to the case at bar and is, therefore, unconstitutional and void, then the enactment of 1903 is wholly void and unconstitutional for reasons heretofore expressed by Judge Cooley and the Court in the case of McNulty vs. People, 28 Pac., 816; or, if the Court holds that Sec. 5124 is read into the act of March 9, 1903, then this case should be remanded with instructions to sentence under the old law.

Respectfully submitted,

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